86-319

No._____

FILED

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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN R. VAN DRASEK,

Petitioner,

v.

JOHN LEHMAN,
SECRETARY OF THE NAVY,
CHAPMAN COX,
ASSISTANT SECRETARY OF THE NAVY
FOR MANPOWER AND RESERVE AFFAIRS,
AND
THE UNITED STATES OF AMERICA

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

1. Whether citizens should be barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service?

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Cases:

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioner, John R. Van Drasek, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered on January 23, 1986.

OPINIONS BELOW

The United States Court of Appeals for the Federal Circuit affirmed the judgment of the United States District Court for the District of Columbia without written opinion but by adoption of the trial court opinion. *See* Appendix at A-1. The opinion of the trial court of December 6, 1983 is unreported and is reproduced and attached as an Appendix at A-2 to A-8. Appeal was first taken to

the United States Court of Appeals for the District of Columbia Circuit which court transferred the appeal, pursuant to 28 U.S.C. Section 1631 (1982), to the United States Court of Appeals for the Federal Circuit. *Van Drasek v. Lehman, et al.*, 762 F.2d 1065 (D.C.Cir. May 31, 1985). *See* Appendix at A-9 to A-18.

JURISDICTION

The United States Court of Appeals for the Federal Circuit entered the judgment in this case on January 23, 1986 (Appendix at A-1). Petitioner's motion for rehearing was denied on April 1, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 17 of the United States Supreme Court Rules.

STATEMENT OF THE CASE

Petitioner John Van Drasek enlisted in the United States Marine Corps in 1965 and served from 1966-68 in combat leadership positions in Vietnam, receiving the Bronze Star Medal, with Combat Distinguishing Service. *AR, Vol. IV*, pp. 199-200.[1] Petitioner came up through the ranks, always being promoted to the next highest rank in the shortest time possible, to the commission of Captain (JA 84).[2]

On June 17, 1983, petitioner, having been twice passed over for promotion to Major, instituted an action in the United States District Court for the District of Columbia challenging his involuntary discharge pursuant to 10 U.S.C. Section 632 (Appendix at A-2). His claims included that his First and Fifth Amendment rights were violated incident to complaints against his commanding officer, regarding denial of equal employment opportunity for women Marines and command influence, pursuant to Article 138 of the Uniform Code of Military Justice,

[1]"AR" refers to the Administrative Record (in four volumes) before the Board for Correction of Naval Records ("BCNR").

[2]"JA" refers to Joint Appendix in the Federal Circuit.

10 U.S.C. Section 938 ("UCMJ") (Appendix at A-2). He also claimed that his failure to be promoted was improper and retaliatory (Appendix at A-2).

From June 28, 1981 to September 28, 1982, petitioner, then Captain Van Drasek, served at the Officer Candidate School ("OCS"), Marine Corps Development and Education Command, in Quantico, Virginia, as Director of the NCO Leadership School ("NCOLS"). In October, 1981, petitioner challenged his commanding officer, Colonel M. T. Cooper's exclusion of pregnant Marines from courses at NCOLS, *AR, Vol. IV*, pp. 241-250.[3] A few weeks later, Colonel Cooper filed a fitness report (for the period June 23, 1981 to November 30, 1981) rating petitioner as "excellent" (second grade) in every observed category (Appendix at A-3). For the first time since 1974, petitioner was rated without a single mark of "outstanding" (top grade) (JA 84). Such a bright line report is commonly known among Marine Corps officers as a "killer" fitness report. *AR, Vol. IV*, p. 331. It was this fitness report which was the last entry in petitioner's Service Record Book ("SRB") and Fitness Report Brief before the April, 1982 Major selection board, which passed him over for promotion to major. This was petitioner's first promotion passover in his military career. *AR, Vol. IV*, pp. 305-307; (JA 6).

On May 18, 1982, through proposed MCDEC Order 1510.10 for the NCOLS 1982-83 academic year, petitioner formally recommended against discriminatory treatment of pregnant Marines. App. 27-28.[4] Shortly thereafter, Cooper issued a second "excellent" fitness report (for December 1, 1981 to May 31, 1982) (Appendix at A-3), which was before the second (March 1983) promotion board to pass over petitioner, ensuring his mandatory separation pursuant to 10 U.S.C. Section 632 (1980).

[3]In February 1982, Colonel Cooper ordered the OSC's *Standard Operating Procedures*, requiring use of "male candidate(s)" for parade honor billets for all but one staff position (App. 20-21). ("App." refers to the Appendix to petitioner's brief below of Pertinent Statutes and Regulations.) The order was in direct contravention of the *Marine Corps Equal Opportunity Manual*, MCO P5354.1.

[4]In response, MCDEC Order 1510.10D, App. 29-30, barring pregnant Marines from NCOLS (in violation of MCO P5354.1, *supra*, paragraph 3009), was issued on October 20, 1982. *See* paragraph 4a(4).

On July 16, 1982, petitioner, having been appointed to a six-month term on an Administrative Discharge Board ("ADB"), joined a unanimous vote in the *Frederick* case to retain a Marine despite an alleged drug abuse problem. Appendix at A-3. Without authority, Colonel Cooper removed petitioner from a case on review on August 6, 1982. Appendix at A-3. On August 10, petitioner again voted with a unanimous board in the *North* case to recommend a Marine be given an honorable discharge.

Pursuant to that vote and following a long discussion with Colonel Cooper, that same day, August 10, 1982, petitioner was ordered transferred from OCS. Although those orders were canceled, on September 18, 1982, Cooper succeeded in transferring petitioner on grounds that he was medically unfit (Appendix at A-3),[5] following petitioner's accident while parachuting, an activity authorized by Colonel Cooper. *AR, Vol. III,* p. 57. The OCS assignment was critical for promotion. *AR, Vol. IV,* pp. 252-3.

It is important to note that Colonel Cooper, in response to the later Article 138 complaint, stated that he had considered transferring petitioner due to dissatisfaction with his performance in the spring of 1982, during the ongoing conflict over treatment of women Marines (Appendix at A-4) and petitioner's rating of "excellent." *AR, Vol. IV,* pp. 37-42. It is inconsistent for Cooper to have contemplated transferring petitioner for unsatisfactory performance, unless an "excellent" rating is indeed a "killer" report.

Petitioner initiated an Article 138 Complaint of Wrongs against Colonel Cooper by letters dated September 29 and October 8, 1982 (Appendix at A-3). He alleged that Colonel Cooper had exerted improper command influence on OCS personnel with regard to their testifying on behalf of Marines who were the subjects of judicial and administrative discharge actions and with regard to their voting as members of court-martial and ADB's. He also alleged that his removal from the ADB and his transfer from OCS had been in retaliation for his part in the board's decision in the *Frederick* case (Appendix at A-3).

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[5]This, despite the unrebutted assertion, that Cooper's subordinates who gave statements in the Article 138 investigation in support of Cooper, had equally or more serious medical problems and were allowed to remain at OCS by Cooper.

Petitioner's Article 138 complaint was investigated by Colonel Curtis G. Lawson, who issued a report dated February 28, 1983 (Appendix at A-4). Although he concluded that Colonel Cooper did not commit the wrongs alleged, in contradiction to his conclusion Colonel Lawson found that a number of officers at OCS felt that they were subject to pressure with regard to testifying and voting in court-martial and ADB proceedings (Appendix at A-4). Colonel Lawson accepted Cooper's explanation of the transfer. The Commanding General's response to the complaint and investigation was to direct that proper practices be followed in staffing discharge boards, that Cooper make clear to his subordinates the absence of improper influence on administrative and judicial actions, and that Colonel Cooper be advised of the concerns of female Marines regarding inappropriate treatment (Appendix at A-4). The Secretary of the Navy approved this disposition on May 17, 1983 (Appendix at A-4).

Petitioner was passed over for promotion in March, 1983, subjecting him to mandatory discharge on November 1, 1983, or as soon thereafter as he finished his physical disability processing. Petitioner filed an application for correction of Military or Naval Records on June 23, 1983 (JA 83) with the Board for Correction of Naval Records ("BCNR").

Petitioner instituted this action on June 17, 1983. On June 27, 1983, the parties filed a joint stipulation agreeing to stay the district court action pending pursuit of administrative remedies before the BCNR. This case was reinstated on October 31, 1983 by the district court when the BCNR denied relief to petitioner, determing, *inter alia,* that it did not have jurisdiction (JA 1), except to direct that steps be taken to locate a missing fitness report (which was missing, with another report, from the materials considered by both promotion selection boards). The BCNR refused petitioner's request that it consider correcting the records of his Article 138 complaint because they did not appear in his military personnel records (Appendix at A-4). These conclusions were reached by the BCNR despite its finding that petitioner's transfer may well have resulted from Colonel Cooper's displeasure at petitioner's voting on the ADB. The BCNR questioned Cooper's judgment and fairness (JA 23). Yet, the BCNR determined that although the transfer may have been retaliatory, no such motives were found in regard to the first contested Fitness Report. *Id.*

On December 6, 1983 the district court dismissed appellant's Article 138 claim for lack of subject matter jurisdiction, and affirmed the judgment of the Secretary of the Navy, acting through the BCNR (Appendix at A-2). Petitioner filed his appeal with the United States Court of Appeals for the District of Columbia Circuit on December 22, 1983 (JA 3).

On May 31, 1985, the United States Court of Appeals for the District of Columbia Circuit transferred this action pursuant to 28 U.S.C. Section 1631 (1982) to the United States Court of Appeals for the Federal Circuit under the authority of the Federal Courts Improvement Act, 28 U.S.C. Section 1295(a)(2) (1982). *Van Drasek v. Lehman, et al.*, 762 F.2d 1065, 1067, 1072 (D.C.Cir. 1985). On January 23, 1986, the Federal Circuit Court of Appeals affirmed the district court adopting the trial court opinion. Rehearing was denied on April 1, 1986.

REASONS FOR GRANTING THE WRIT

I. Citizens should not be barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.

This Court should grant certiorari to resolve whether a district court has the jurisdiction to review an Article 138 proceeding to determine if there have been First Amendment and Fifth Amendment due process violations. There exists a conflict among the circuits as to whether Article 138 proceedings are reviewable, as well as, what standard or test to use to make such a determination.

The courts below premised rejection of subject matter jurisdiction over Article 138 proceedings upon the finding that "...Article 138 is an internal, military mechanism for handling complaints..." (Appendix A-5) and upon "...well-established principles of the distinct role of military justice and judicial deference in matters of internal military management..." (Appendix at A-5).

In *Chappell v. Wallace*, 462 U.S. 297, 103 S.Ct. 2362, 2366 (1983), this Court made clear that Article 138 "provides for the review and remedy of complaints and grievances such as those presented by" peitioner. *Chappell v. Wallace* directed grievances

by military personnel to be presented pursuant to 10 U.S.C. Section 938 and Section 1552(a) (by Article 138 complaint and before the BCNR, respectively), while recognizing that decisions of the BCNR are subject to judicial review.

> This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service, citing *Brown v. Glines*, 444 U.S. 348 (1980); *Parker v. Levy*, 417 U.S. 733 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

103 S.Ct. at 2367. *See also, Harmon v. Brucher*, 355 U.S. 579, (1958).

Petitioner had been denied procedural and substantive review of his Article 138 complaint before the BCNR (JA 22). When the courts below also refused subject matter jurisdiction, petitioner was denied review altogether.

In *Secretary of the Navy v. Huff*, 444 U.S. 453 (1980) (per curiam), this Court, in deciding a case involving allegations of denials of First and Fifth Amendment rights to "expression," noted that:

> [R]egulations in each Armed Service were promulgated under a (DOD) directive that "Advises commanders to preserve servicemen's right to expression...to the maximum extent possible, consistent with good order and discipline and the national security." *Brown v. Glines, ante*, at 355. *A member of the service who thinks that his commander has misapplied the regulations can seek remedies within the service. See*, e.g.,...(Article 138). *Furthermore, the federal courts are open to assure that, in applying the regulations commanders do not abuse the discretion necessarily vested in them.* [Emphasis added.]

It is this assurance petitioner invokes from the federal courts.

Huff and *Chappell* make it clear that when alleging First and Fifth Amendment claims, Article 138 is the correct administrative remedy, and that Article 138 complaints are directly reviewable in federal court if the "commanders...abuse (their) discretion" by not "applying the regulations" in the manner required by law.

In *Colson v. Bradley*, 477 F.2d 639 (8th Cir. 1973), the court reversed the district court for not issuing a writ of mandamus where the plaintiff had proven that his superiors had failed to folow their own regulations in regard to investigation of complaints pursuant to Article 138. 477 F.2d at 641-2. The trial court, whose opinion was relied upon below, recognized the conflict with *Colson v. Bradley* (Appendix at A-6).

The district court relied on *Moore v. Schlesinger*, 384 F.Supp. 163 (D.Colo. 1974) (Appendix at A-5) for the proposition that the district court had no jurisdiction over the Article 138 investigation. In *Moore*, the Court ruled that there was "no statutory authority for...court review...and (Article 138 proceedings)...are expressly excluded from (APA review)...5 U.S.C. Section 701(b)(1)(F)." 384 F.Supp. at 166. These conclusions are unsupported by the Court in *Moore* by citation to any other case. Further, no other court has cited the case for this proposition and *Colson v. Bradley* holds exactly the opposite.[6]

Case law holds that the courts should abstain from intervening into a particular military decision until an "appropriate time." *Turner v. Calloway*, 371 F.Supp. 188, 192-3 (D.D.C. 1974). Two of the remedies courts have required service members to exhaust are the Article 138 Complaint and BCMR proceedings. Reviewability of BCMR proceedings has a settled case history. *Geyer v. Marsh*, 782 F.2d 1351 (5th Cir. 1986); *Powell v. Marsh*, 560 F.Supp. 636 (D.D.C. 1983); *Grieg v. United States*, 640 F.2d 1261 (Ct.Cl. 1981), *cert. denied*, 455 U.S. 907 (1982); *Heisig v. United States*, 719 F.2d 1153 (Fed.Cir. 1983). There have been cases where the service member attempted to pursue an Article 138 remedy, could not so resolve the dispute, and successfully sought review in federal court. *Turner v. Calloway, supra; MacKay v. Hoffman*, 403 F.Supp. 467 (D.D.C. 1975); *Allen v. Monger*, 404 F.Supp. 1081 (N.D.Ca. 1975); *United States ex. rel.*

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[6]The Administrative Procedure Act ("APA") does not preclude judicial review. Although the APA provides that an agency subject to judicial review does not include "court-martial and military commissions," 5 U.S.C. Section 701(b)(1)(F), Article 138, 10 U.S.C. Section 938, *et. seq.*, as implemented by Ch. XI, Manual of the Judge Advocate General Section 1101-1114 provides for a "court of inquiry" or "board of officers," mere advisory boards. *Madsen v. Kinsella*, 343 U.S. 341, 345-7, n. 9 (1982).

Berry v. Commanding General, 411 F.2d 822 (5th Cir. 1969); *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). In several cases the federal courts have simply afforded plaintiff review of a complaint without any discussion of the basis of jurisdiction. *Schatten v. United States*, 419 F.2d 187 (6th Cir. 1969); *Colson v. Bradley, supra; United States ex. rel. Gaston v. Cassidy*, 296 F.Supp. 986 (E.D.N.Y. 1969).

The most thorough test, for determining when federal courts will review military decision, which has been cited favorably by numerous jurisdictions, and from which many jurisdictions take guidance, is the *Mindes* test. *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). The *Mindes* test is very protective of military autonomy in that it requires that

> a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice remedies.

Mindes, 453 F.2d at 201. Once a plaintiff meets both of these requirements, the court must, under Mindes, "examine the substance of that allegation in light of the policy reasons behind nonreview of military matters," including: (1) the nature and strength of the plaintiff's challenge to the military determination, (2) the potential injury to the plaintiff if review is refused, (3) the type and degree of anticipated interference with the military function, and (4) the extent to which the exercise of military expertise or discretion is involved.

Petitioner has met the requirements of the *Mindes* test for judicial review of constitutional violations in the Article 138 proceedings. Petitioner has asserted that the Article 138 Complaint investigation violated the due process clause of the Fifth Amendment and that his and other's First Amendment rights were violated, as well as asserting that there have been statutory and regulatory violations. Since petitioner had exhausted his administrative remedies, he had satisfied both initial *Mindes* requirements.

The basic nature of petitioner's claims, as stated above, are important, and since they involve the Navy's own regulations and Congressional legislation protecting service members' rights, they are fully capable of supporting judicial review. Refusal to review perpetuates "command influence," retaliatory actions and has a "chilling effect" on service members' freedom of expression. A decision in petitioner's favor will mean that respondents must obey the law. Petitioner's claims are that numerous regulations and statutes promulgeted specifically for the protection of service members' rights were violated in the process of a service member invoking their protection. Finally, petitioner is not asking the courts to substitute their expertise or discretion in a peculiarly military matter, but to determine whether his claims of violations in the Article 138 investigation were correct, a task which courts are created to do. The factors in the *Mindes* test balance in favor of judicial review.

The test was used in *Wallace v. Chappell*, 661 F.2d 729 (9th Cir. 1981), which this Court reversed on other grounds, 462 U.S. 297, 103 S.Ct. 2363 (1983), with the recognition that the plaintiffs in the case had not exhausted their intraservice remedies, 103 S.Ct. at 2366. The *Mindes* test has survived the decision of *Chappell v. Wallace* in several cases. *Navas v. Gonzalez-Vales*, 752 F.2d 765 (1st Cir. 1985); *Penagaricano v. Llenza*, 747 F.2d 55 (1st Cir. 1984); *Trerice v. Pedersen*, 769 F.2d 1398 (9th Cir. 1985); *Gonzalez v. Department of the Army*, 718 F.2d 926 (9th Cir. 1983); *Williams v. Wilson*, 762 F.2d 357 (4th Cir. 1985), but cf. *Bluth v. Laird*, 435 F.2d 1065 (4th Cir. 1970) (justicability of claimed violation of military regulations assumed where intraservice administrative remedies exhausted).

The Federal Circuit, although it has not applied the *Mindes* test itself, has cited the case with approval and criticized a district court for not properly applying the test. *Maier v. Orr*, 754 F.2d 973, 984-5 (Fed. Cir. 1985). Eight circuits have accepted the test. *See*, "Judicial Review of Constitutional Claims Against the Military," 84 Col.L.Rev. 387 (March 1984). The Third Circuit rejected the *Mindes* test in *Dillard v. Brown*, 652 F.2d 316 (3rd Cir. 1981). Although the D.C. Circuit has cited *Mindes* favorably, *Vander Molen v. Stetson*, 571 F.2d 617 (D.C. Cir. 1977), the D.C. Circuit has used the more traditional approach that "(i)t is the duty of the federal courts to inquire whether an action of a

military agency conforms to the law, or is instead arbitrary, capricious, or contrary to the statutes and regulation governing that agency (citations omitted)." *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979).

Petitioner seeks review of the Article 138 proceedings in much the same way as did the petitioner in this Court's recent decision of *Lindahl v. Office of Personnel Management*, ____ U.S. ____, 105 S.Ct. 1620 (1985). In *Lindahl* this Court found that the Federal Circuit had erred in concluding that judicial review was unavailable "to determine whether 'there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination.' *Scroggins v. United States*, 184 Ct.Cl. at 534, 397 F.2d at 297." *Lindahl v. OPM, supra*, 105 S.Ct. at 1633.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage prepaid, to Charles R Gross, Esquire, Commercial Litigation Branch, Civil Division, United States Department of Justice, ATTN: Classification Unit, 2nd Floor, Todd Building, Washington, D.C. 20530, this _____ day of August, 1986.

STEPHEN G. MILLIKEN

APPENDIX

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL COURT

JOHN R. VAN DRASEK,	)	Appeal No. 85-2438
	)	
Appellant,	)	
	)	
v.	)	
	)	
JOHN LEHMAN,	)	
SECRETARY OF THE NAVY,	)	
	)	
Appellee.	)	

DECIDED: January 23, 1986

Before RICH, BALDWIN, and BENNETT, *Circuit Judges.*

PER CURIAM.

The decision of the United States District Court for the District of Columbia is *affirmed* on the basis of that court's December 6, 1983 opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN R. VAN DRASEK,)
)
Plaintiff,)
) Civil Action No. 83-1761
v.)
)
JOHN LEHMAN, *et al.*,)
)
Defendants.)
)

OPINION OF THE HONORABLE CHARLES R. RICHEY

Plaintiff, a Captain in the U.S. Marine Corps, having been twice passed over for promotion to Major, instituted this action challenging his involuntary discharge pursuant to 10 U.S.C. § 632. He claims that his first and fifth amendment rights were violated incident to a complaint he filed against his commanding officer pursuant to Article 138 of the Uniform Code of Military Justice, 10 U.S.C. § 938 ("UCMJ"). He also claims that his failure to be promoted was improper and retaliatory. The Court entered a temporary restraining order on October 31, 1983, prohibiting defendants from taking further action to separate plaintiff from the Marine Corps. That order was extended by agreement up to and including December 6, 1983. Defendants have now filed a motion to dismiss or, in the alternative, for judgment of affirmance, and plaintiff has responded with a memorandum in opposition and a cross-motion for judgment on the merits. For the reasons stated below, the defendants' motion is granted. Plaintiff's Article 138 claim is dismissed for lack of jurisdiction and the judgment of the Secretary of the Navy, acting through the Board for Correction of Naval Records ("BCNR"), is affirmed.

BACKGROUND

Plaintiff enlisted in the Marine Corps in 1965 and progressed steadily to the rank of captain. From June 28, 1981 to September 28, 1982, he served at the Officer Candidates School ("OCS"), Marine Corps Development and Education Command, in Quantico, Virginia, as director of the NCO Leadership School ("NCOLS"). During this entire period, Colonel M. T. Cooper served as the commanding officer of OCS and, as such, completed fitness reports on plaintiff for the periods June 23, 1981 to November 30, 1981, and December 1, 1981 to May 31, 1982. Although these reports rated plaintiff as "excellent," he did not receive top marks ("outstanding") and ranked below the other officers rated by Colonel Cooper. In April 1982, plaintiff was first considered for promotion to major but was not selected.

Plaintiff was subsequently appointed to a six-month term on an administrative discharge board by the Commanding General in July 1982. On July 16, he joined a unanimous vote for retaining a Marine in the Corps despite a drug abuse problem. Colonel Cooper, without authority from the Commanding General, removed plaintiff from a case review on August 6, but on August 10 plaintiff again voted with a unanimous board to give a different Marine an honorable discharge on drug and misconduct charges. Also on August 10, plaintiff was ordered transferred from OCS effective August 13, 1982. The transfer was cancelled after discussion between plaintiff and Colonel Cooper on August 13. Two days later, plaintiff broke his leg parachuting. He was finally transferred on September 18, 1982.

By letters dated September 29 and October 8, 1982, plaintiff initiated a complaint of wrongs against Colonel Cooper under Article 138 of the UCMJ. Plaintiff alleged that Colonel Cooper had exerted improper influence on OCS personnel with regard to their testifying on behalf of Marines who were the subject of judicial and administrative discharge actions and with regard to their voting as members of courts martial and administrative discharge boards. He also alleged that his removal from the discharge board and his transfer from OCS had been in reprisal for his part in the board's decision of July 16, 1982, to retain a Marine in the Corps.

Colonel Cooper responded that he had considered transferring plaintiff as early as the spring of 1982 due to dissatisfaction with his performance. He stated that the decision was eventually triggered by plaintiff's fractured leg because there were no available jobs at OCS for an officer on limited duty.

Plaintiff's Article 138 complaint was investigated by Colonel Curtis G. Lawson, who issued a report dated February 28, 1983. Although he concluded that Colonel Cooper did not commit the wrongs alleged, he found that a number of officers at OCS felt that they were subject to pressure with regard to testifying and voting in court-martial and administrative discharge proceedings. Colonel Lawson accepted Colonel Cooper's explanation of plaintiff's transfer. The Commanding General's response to the complaint and investigation was to direct that proper practices be followed in staffing discharge boards, that Colonel Cooper make clear to his subordinates the absence of improper influence on administrative and judicial actions, and that Colonel Cooper be advised of the concerns of female Marines regarding inappropriate treatment. The Secretary of the Navy approved this disposition on May 17, 1983.

Plaintiff was again passed over for promotion in March 1983, subjecting him to mandatory discharge on November 1, 1983, or as soon thereafter as he finished his physical disability processing. Captain Van Drasek then filed this suit in district court but the action was stayed to allow him to exhaust his administrative remedies. At the BCNR hearing on October 21, 1983, plaintiff and two other witnesses testified. The Board made its recommendation on November 7, 1983, denying plaintiff all relief except directing that steps be taken to locate a missing fitness report. It refused plaintiff's request that it consider correcting the records of plaintiff's Article 138 complaint because they did not appear in this military personnel records.

I. THIS COURT LACKS JURISDICTION TO REVIEW THE MERITS OF PLAINTIFF'S ARTICLE 138 CLAIM

Article 138 of the UCMJ, 10 U.S.C. § 938, provides:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer, exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

Thus Article 138 is an internal, military mechanism for handling complaints, separate from the BCNR which is "composed of civilians appointed by the Secretary of the Navy, [and which] provides another means with which an aggrieved member of the military 'may correct any military record....' 10 U.S.C. § 1552(a)." *Chappell v. Wallace*, 103 S.Ct. 2362, 2367 (1983).

There is no statutory authority for judicial review of Article 138 proceedings, and "courts martial and military commissions" are expressly excluded from review under the Administrative Procedure Act, 5 U.S.C. § 701(b)(1)(F). Few courts have directly addressed the question of judicial review of Article 138 proceedings. *See, e.g., Cortwright v. Resor*, 447 F.2d 245 (2nd Cir. 1971); *Moore v. Schlesinger*, 384 F.Supp. 163 (D. Colo. 1974). These decisions, along with well-established principles of the distinct role of military justice and judicial deference in matters of internal military management, lead this court to conclude that it cannot reexamine the substance of the Article 138 decision.

> [J]udges are not given the task of running the Army. The responsibility for setting up channels through which...grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Orloff v. Willoughby, 345 U.S. 83, 93-94 (1955).

This fundamental reluctance to intrude on military decisionmaking, as a matter of judicial prudence if not always judicial power, is illustrated by a number of recent Supreme Court cases. *See Chappell v. Willoughby*, 103 S.Ct. 2362 (1983); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Parker v. Levy*, 417 U.S. 733 (1974); *Gilligan v. Morton*, 413 U.S. 1 (1973). The general policy of deference is particularly appropriate in the context of Article 138 complaints:

> Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.

Chappell, 103 S.Ct. at 2365.*

This is not to say that military personnel may be "stripped of basic rights simply because they have doffed their civilian clothes." E. Warren, *The Bill of Rights & the Military*, 37 N.Y.U.L. Rev. 181, 188 (1962). *See also Chappell*, 103 S.Ct. at 2367-68; *Parker*, 417 U.S. at 758. Civilian courts have the power to oversee certain aspects of the military justice system,

> [b]ut implicit in the congressional scheme embodied in the Code [of Military Justice] is the view that the military court system generally is adequate to and responsibly perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights.

Schlesinger, 420 U.S. at 758. In this case, the Court finds that the processing of plaintiff's Article 138 complaint comports with constitutional requirements. The investigation, report of findings, and remedial action satisfy the minimum standards of procedural due process. Plaintiff's allegations of first amendment violations similarly do not warrant relief. *See Parker*, 417 U.S. at 758. *Cf. Colson v. Bradley*, 477 F.2d 639, 641 (8th Cir. 1973) (mandamus remedy appropriate where a superior officer fails to fulfill his duty to investigate).

II. THE BCNR DECISION WAS NOT ARBITRARY OR CAPRICIOUS

BCNR decisions can be set aside by a court only "if they are arbitrary, capricious or not based on substantial evidence." *Chappell*, 103 S.Ct. at 2367. *See also deCicco v. United States*, 677 F.2d 66, 70 (Ct.Cl. 1982); *Grieg v. United States*, 640 F.2d 1261, 1268 (Ct.Cl. 1981), *cert. denied*, 455 U.S. 907 (1982); *Powell v. Marsh*, 560 F.Supp. 636, 641 (D.D.C. 1983) Review must proceed with due regard for the "strong policies [that] compel the court to allow the widest possible latitude to the armed services in their administration of personnel matters." *Sanders v. United States*, 594 F.2d 804, 814 (Ct.Cl. 1979). The Board's decision in Captain Van Drasek's case is supported by substantial evidence and must, therefore, be affirmed.

The Board submitted an eleven-page, single-spaced typewritten report to the Secretary of the Navy on November 7, 1983. It carefully addressed plaintiff's complaints both as to the accuracy of his fitness reports and as to the correctness and fairness of his failures of selection for promotion. With regard to the fitness reports, the BCNR noted that plaintiff received "excellent" ratings and that there were no unfavorable narrative comments. Further, the Board determined that the contested reports were not aberrant when compared with the rest of plaintiff's records. Of particular importance is the fact that the contested reports could *not* have been influenced by Captain Van Drasek's dispute with Colonel Cooper over his votes while serving on the administrative discharge board because they *predated* his appointment.

The Board also found that plaintiff's record before both promotion selection boards was substantially complete. It was not persuaded by the evidence that the 1983 selection board was even award of Captain Van Drasek's Article 138 complaint, "much less that the board improperly held against him the fact that he exercised his rights..." The BCNR rejected plaintiff's claim that his record was so good that his failure to be promoted must have been on improper considerations. The Court has determined that these findings are reasonable and supported by substantial evidence.

CONCLUSION

For the reasons stated above, the Court affirms the judgment of the Secretary of the Navy and will enter an order accordingly of even date herewith dismissing the case.

December 6, 1983 — /s/ Charles R. Richey

Charles R. Richey
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-2343

JOHN R. VAN DRASEK, CAPTAIN, APPELLANT

v.

JOHN LEHMAN, Secretary of the Navy, *et al.*

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 83-1761)

Argued October 16, 1984

Decided May 31, 1985

Stuart Steinberg, with whom *Stephen G. Milliken* was on the brief, for appellant.

Michael J. Ryan, Assistant United States Attorney, with whom *Joseph E. diGenova*, United States Attorney, *R. Craig Lawrence*, *William J. Birney*, *Royce C. Lamberth*, Assistant United States Attorneys, and *Charles R. Gross*, Captain, Office of the Judge Advocate General, Department of the Navy, were on the brief, for appellees.

Before TAMM, MIKVA, and EDWARDS, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge:* The Federal Courts Improvement Act, 28 U.S.C. § 1295(a)(2) (1982), provides that the United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction over appeals from final decisions of a district court if the jurisdiction of that court was based "in whole or in part" on the Tucker Act, 28 U.S.C. § 1346(a)(2) (1982). Although neither party in this case raised the issue of this court's appellate jurisdiction, we find that appellant's action against the United States was based in part on the Tucker Act and that jurisdiction over the appeal therefore lies in the Federal Circuit. Accordingly, we transfer the case pursuant to 28 U.S.C. § 1631 (1982).

I. BACKGROUND

John Van Drasek enlisted in the United States Marine Corps in 1965 and progressed steadily to the rank of captain. In April 1982 and March 1983, the Marine Selection Board passed over Captain Van Drasek for promotion to major, subjecting him to mandatory dismissal from the military pursuant to 10 U.S.C. § 632 (1982). Because he believed the decisions denying him promotion were unfairly and unlawfully based on evaluations from a superior officer with whom he had several conflicts, Van Drasek petitioned the Board for the Correction of Naval Records (BCNR) to void his superior's evaluation and order the Selection Board to reconsider his promotion to major.

After exhausting his administrative remedies without success, Van Drasek sued in the district court, claiming that his constitutional and statutory rights had been violated and the BCNR had arbitrarily refused to order his reconsideration. Van Drasek also sought $9,999 in back pay. The district court denied all relief, and this appeal followed.

II. DISCUSSION

A.

The Federal Courts Improvement Act, 28 U.S.C. § 1295(a)(2), provides that the United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of appeals from final

decisions of district courts "if the jurisdiction of that court was based, in whole or in part," on 28 U.S.C. § 1346(a)(2), the Tucker Act.[1] Section 1346(a)(2) gives district courts concurrent jurisdiction with the Claims Court over "[a]ny . . . civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department. . . ."

Captain Van Drasek's original complaint requested, *inter alia,* "a Writ of Mandamus ordering the Defendants to award all back pay and other benefits to which Plaintiff would be entitled had he been promoted when originally considered, if Plaintiff is found qualified and is, in fact, promoted to the rank of Major." Complaint at 42-43 (filed November 1, 1983). Recognizing a possible problem with jurisdiction over the back pay claim, United States District Judge Charles R. Richey asked the parties whether Van Drasek's claims for monetary relief should be heard by the Claims Court. In response, Van Drasek amended his complaint to waive all back pay in excess of $9,999.99. Amended Complaint at 50-51 (filed November 10, 1983). In a footnote to this claim for back pay, Van Drasek cited *Vander Molen v. Stetson,* 571 F.2d 617 (D.C. Cir. 1977), a case which held that by waiving recovery in excess of $10,000, a plaintiff could bring suit in the district court under the Tucker Act, 28 U.S.C. § 1346(a)(2). Judge Richey rejected Van Drasek's claim on the merits, finding that the BCNR acted reasonably in denying his reconsideration for promotion to major.

B.

The plain language of the Federal Courts Improvement Act directs our attention not to the claims advanced on appeal but to the basis of the district court's original subject matter

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[1] The Tucker Act consists of 28 U.S.C. § 1491, which sets out the jurisdiction of the Claims Court, and § 1346(a)(2), which gives concurrent jurisdiction to the district courts for claims not exceeding $10,000. The Federal Circuit affectionately refers to the latter section as the "Little Tucker Act." *See e.g.* Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1575 n.15 (Fed. Cir. 1984).

jurisdiction.[2] If the plaintiff makes any claim that invokes the jurisdiction of the district court under the Tucker Act, the entire case must be appealed to the Federal Circuit. *See* 28 U.S.C. § 1295(a)(2) (Federal Circuit has exclusive appellate jurisdiction if jurisdiction of the district court "was based, in whole *or in part*," on the Tucker Act (emphasis added)). As explained in greater detail below, for a claim in the district court to be based on the Tucker Act, it must (1) seek money (2) not exceeding $10,000 (3) from the United States and (4) be founded either upon a contract or upon a provision of the "the Constitution, or any Act of Congress, or any regulation of an executive department," 28 U.S.C. § 1346(a)(2), that "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell*, 103 S.Ct. 2961, 2968 (1983). If any of these requirements are *not* met, the claim falls outside the scope of the Tucker Act, and this court would retain appellate jurisdiction over the entire case.

1. *Money Claim.*

For reasons not germane to this appeal, the Supreme Court has limited the scope of the Tucker Act to claims for money. *See United States v. King*, 395 U.S. 1, 2-3 (1969). Although consent to suit is necessary for monetary and non-monetary claims alike, the Tucker Act is not implicated when the plaintiff seeks only declaratory and injunctive relief. In *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984), for example, this court heard an appeal of an officer who alleged that the Navy had unconstitutionally discharged him for engaging in homosexual conduct. Dronenburg, like Van Drasek, originally sought

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[2]Although neither Van Drasek nor the government raise the issue of this court's appellate jurisdiction, our duty to consider it *sua sponte* is well established. *See* City of Kenosha v. Bruno, 412 U.S. 507, 511-14 (1973). Since the enactment of the Federal Courts Improvement Act in 1982, we have received an increasing number of cases that should have been filed with the Federal Circuit. While we usually dispose of these cases by unpublished orders transferring the appeals to the Federal Circuit, *see e.g.*, Corwin v. Lehman, 724 F.2d 1577 (Fed. Cir.), *cert. denied*, 104 S.Ct. 2680 (1984); Heisig v. United States, 719 F.2d 1153 (Fed. Cir. 1983), we issue a published opinion in this case to alert counsel, especially those who regularly defend actions against the United States, to the impact of the Federal Courts Improvement Act upon our appellate jurisdiction.

reinstatement and money damages. Dronenburg, however, amended his complaint to eliminate any claim for money, leaving only claims for injunctive and declaratory relief. *Id.* at 1390 n.2. This court found that 5 U.S.C. § 702 (1982) waived sovereign immunity for Dronenburg's non-monetary claims,[3] thereby permitting suit against the United States in the district court under the general federal question statute, 28 U.S.C. § 1331 (1982).[4] Since Dronenburg made no claim for money damages, the jurisdiction of the district court could not have been based on the Tucker Act. This court's appellate jurisdiction was thus unaffected by the Federal Courts Improvement Act.[5] *See Jones v. Alexander*, 609 F.2d 778 (5th Cir.) (Tucker Act irrelevant where plaintiff waived all actual damages and sought mandamus to prevent his release from active duty and for correction of his military records), *cert. denied*, 449 U.S. 832 (1980). *See also Blevins v. Orr*, 721 F.2d 1419 (D.C. Cir. 1983) (affirming dismissal on the merits of claim by former Air Force officer for retroactive promotion but no back pay); *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978) (vacating and remanding dismissal of claims by former airman for declaratory and injunctive relief).

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[3]Section 702, as amended in 1976, states that an "action in a court of the United States seeking relief other that [sic] money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States." 5 U.S.C. § 702 (1982). As the court's discussion in *Dronenburg* suggests, even before section 702 was amended to explicitly waive sovereign immunity for non-monetary claims against the United States, sovereign immunity was no bar to federal employees seeking reinstatement from an unlawful discharge. *See e.g.*, Service v. Dules, 354 U.S. 363 (1957).

[4]Under *Dronenburg*, therefore, a district court has jurisdiction over a non-monetary claim even though the same facts giving rise to the non-monetary claim would support an action for money in the Claims Court. *Accord*, Hahn v. United States, 757 F.2d 581, 588-89 (3d Cir. 1985). *See also* Greene v. McElroy, 360 U.S. 474 (1959).

[5]Although the appeal in *Dronenburg* was filed after the effective date of the Federal Courts Improvement Act, the court did not address the Tucker Act issue in terms of its own jurisdiction. By finding that the Tucker Act did not preclude the district court from exercising jurisdiction, however, the court in essence completed the inquiry into its own jurisdiction.

2. *Not in Excess of $10,000.*

The district court's jurisdiction under the Tucker Act is limited to claims not exceeding $10,000. 28 U.S.C. § 1346(a)(2). In *Doe v. United States Department of Justice*, 753 F.2d 1092 (D.C. Cir. 1985), for example, this court considered and rejected the argument that the Federal Circuit had exclusive jurisdiction over an appeal from the district court. Doe formerly an attorney for the Department of Justice, filed suit against the United States and individual defendants seeking reinstatement and back pay. On apeal, this court concluded that, although Doe did not specify the amount of the back pay sought, it must have been in excess of $10,000. Since the Tucker Act grants concurrent jurisdiction to the district court only in claims for less than $10,000, we concluded that the district court had no jurisdiction to adjudicate the back pay claim. Because it did not have jurisdiction to hear the back pay claim, the jurisdiction of the district court could not have been based, even in part, on the Tucker Act. We therefore properly exercised appellate jurisdiction over the case. *Id.* at 1101-02. *See also Hahn v. United States*, 757 F.2d 581, 587 n.3 (3d Cir. 1985)[6]

3. *Against the United States.*

The Tucker Act by its terms is limited to suits against the United States. Even if the United States is not a named defendant, however, "if 'the judgment sought would expend itself on the public treasury,'" the suit will be construed as one against the United States requiring a waiver or sovereign immunity. *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (citations omitted). *See also Hill v. United States*, 571 F.2d 1098, 1101 n.5 (9th Cir. 1978) (since the back pay airman demanded would come from the

[6]In *Hahn*, the district court awarded the class action plaintiffs declaratory, injunctive, and an unspecified amount of monetary relief. The court of appeals reversed, finding that since the plaintiffs failed effectively to waive damages in excess of $10,000, the district court did not have jurisdiction over the monetary claim. The court remanded the monetary claims, granting the plaintiffs leave to amend their complaint to waive damages in excess of $10,000 and proceed in the district court or to take their monetary claims to the Claims Court. 757 F.2d at 587-88. As in *Doe*, the court in *Hahn* retained appellate jurisdiction over the entire case because the plaintiffs made no claim that fell within § 1346(a)(2).

federal treasury, suit must be construed as one against the United States). *Cf. Industrial Indemnity, Inc. v. Landrieu*, 615 F.2d 644 (5th Cir. 1980) (district court had jurisdiction over suit to recover construction retainages withheld because judgment would be satisfied from a specific fund within the control of HUD and not from the federal treasury). On the other hand, suits brought against a federal official in his individual capacity for violations of a plaintiff's constitutional rights are not suits that require the consent of the United States, and the Tucker Act is not implicated. *See, e.g., Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See generally* 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3655 (1985).

Substantive Right to Compensation.

Although it waives sovereign immunity, the Tucker Act "'"does not create any substantive right enforceable against the United States for money damages."'" *United States v. Mitchell*, 103 S.Ct. 2961, 2968 (1983) (citations omitted). Thus, for a claim to be based on the Tucker Act, it must be founded either upon a contract or upon a provision in "the Constitution, or any Act of Congress, or any regulation of an executive department," 28 U.S.C. § 1346(a)(2), that "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Mitchell*, 103 S.Ct. at 2968.[7]

In *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984), for example, the plaintiff sought to base his money claim against the United States on the government's violation of his first

[7]*Mitchell* makes clear that the existence of a substantive right to recovery against the United States is a *jurisdictional* prerequisite to suit under the Tucker Act. In *Mitchell*, the claimants sued under the "Indian Tucker Act," 28 U.S.C. § 1505, seeking money damages for alleged breaches of trust in connection with the United States' management of forest reserves on an Indian reservation. The issue in the case was whether various statutes governing the management of Indian timber could fairly be interpreted as creating a substantive right to recovery. Having found such a substantive right, the Court concluded that the "Claims Court therefore has jurisdiction over respondents' claims." 103 S.Ct. at 2974. *But see* Hahn v. United States, 757 F.2d 581, 588 n.4 (3d Cir. 1985) (dicta) (existence of a substantive right to recovery is not a jurisdictional matter).

amendment rights. The court found that the taking clause of the fifth amendment is the only provision of the Constitution that can fairly be interpreted as mandating compensation; the first amendment, therefore, does not provide a basis for any substantive right to compensation from the federal government under the Tucker Act. *Id.* at 103 n.31. Clark's claim, therefore, was insufficient to invoke the jurisdiction of the district court under the Tucker Act, *id.*, and this court properly retained appellate jurisdiction over the entire case.[8]

In sum, if any of the plaintiff's claims meets the four requirements set out above, the jurisdiction of the district court is based in part on the Tucker Act, and appellate jurisdiction over the entire case lies in the Federal Circuit. To this general rule, we recognize two limited exceptions. First, in extraordinary circumstances the sheer frivolity of the plaintiff's Tucker Act claim on the merits may be sufficient to deprive the district court of jurisdiction under the Tucker Act. *See Healy v. Sea Gull Specialty Co.*, 237 U.S. 479 (1915).[9] Second, a claim may be brought under statutes that independently confer jurisdiction upon the district court and waive sovereign immunity for money claims against the United States. Such a claim, although falling within the scope of the Tucker Act, will not be deemed to be "based on" the Tucker Act for the purposes of determining appellate jurisdiction.[10]

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[8]In Hostetter v. United States, 739 F.2d 983, 985 (4th Cir. 1984), the court expressly declined to decide whether the district court's jurisdiction could have been based on the Tucker Act because it found that since the discharged employee was not entitled to reinstatement on the merits, no pay would be due in any event. Under our analysis, such ambivalence toward the original basis of the district court's jurisdiction does not comport with the mandate of the Federal Court Improvement Act.

[9]Under the Federal Courts Improvement Act, the Fedeal Circuit also has exclusive appellate jurisdiction over appeals from final decisions of a district court if the jurisdiction of the district court was based on 28 U.S.C. § 1338(a), which provides that the district courts shall have jurisdiction over civil actions relating to patents. The Senate Report to this provision states that "immaterial, inferential, and frivolous allegations of patent questions will not create jurisdiction in the lower court," and therefore not in the Federal Circuit. S. REP. NO. 275, 97th Cong., 1st Sess. 20 (1981), *reprinted in* 1982 U.S. Code Cong. & Ad. News 30.

[10]The textual statement conflicts with language found in many cases suggesting that the Claims Court's jurisdiction is exclusive over claims that fall within the Tucker Act. As the court stated in Graham v. Henegar, 640 F.2d 732, 734 (5th Cir. 1981), "courts confronting the issue have consistently held that the

Although neither the district court's memorandum opinion nor the briefs filed in this appeal explicitly address Van Drasek's claim for back pay, we find inescapable the conclusion that Van Drasek's suit in the district court was based in part on the Tucker Act. Van Drasek's amended complaint expressly seeks money not

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Court of Claims is the sole forum for the adjudication of such a claim, even though the claim would otherwise fall within the coverage of some other statute conferring jurisdiction on the district court." (citing cases). Indeed, there seems to be some confusion in this circuit. *Compare* Doe v. United States Dep't of Justice, 753 F.2d 1092, 1101 (D.C. Cir. 1985) ("Jurisdiction for those monetary claims against the United States exceeding $10,000 lies exclusively with the Claims Court.") *with* Trans-Bay Engineers & Builders, Inc. v. Hills, 551 F.2d 370, 376-77 (D.C. Cir. 1976) (Tucker Act does not bar suit in the district court for claims against the United States exceeding $10,000 because the National Housing Act, 12 U.S.C. § 1702, waives sovereign immunity, and 28 U.S.C. § 1331 provides subject matter jurisdiction).

Upon close analysis, this conflict is more apparent than real. As the court stated in Ghent v. Lynn, 392 F.Supp. 879, 881 (D. Conn. 1975), "[i]n fact, the jurisdiction for the Court of Claims for suits claiming more than $10,000 is not exclusive; rather, there is rarely any statute available that waives sovereign immunity for suits in the district court, other than the Tucker Act with its $10,000 limit" The proper inquiry, then, is whether the statute or statutes relied upon by the plaintiff manifest a congressional intent to consent to suits for money claims against the United States in the district courts notwithstanding the limitations found in the Tucker Act.

In Munoz v. Small Business Administration, 644 F.2d 1361 (9th Cir. 1981), for example, the Ninth Circuit held that the district court had jurisdiction over money claims exceeding $10,000 against the Small Business Administration under 15 U.S.C. § 634(b)(1), which states that the administrator of the SBA may sue and be sued in district court without regard to the amount in controversy. Similarly, we held in National Treasury Employees Union v. Campbell, 589 F.2d 669 (D.C. Cir. 1978), that the district court had jurisdiction over damages claims under 5 U.S.C. § 8912, which provides that the "district courts of the United States have original jurisdiction, concurrent with the Court of Claims, of a civil action or claim against the United States founded on this chapter." *See also Fegruson v. Union National Bank*, 126 F.2d 753, 756-57 (4th Cir. 1942) (12 U.S.C. § 1702 not only waives sovereign immunity but also confers subject matter jurisdiction in the federal courts). *Cf.* Portsmouth Redevelopment & Housting Authority v. Pierce, 706 F.2d 471, 475 (4th Cir.). (42 U.S.C. § 1404a, another "sue and be sued" statute, does not give district courts jurisdiction over money claims falling thereunder because, unlike 12 U.S.C. § 1702, it does not contain the critical language "in any court of competent jurisdiction, State or Federal"), *cert. denied*, 104 S.Ct. 392 (1983).

exceeding $10,000 from the United States.[11] Van Drasek's substantive right to compensation is founded upon an Act of Congress, 10 U.S.C. § 1552, which authorizes boards for the correction of military records to award back pay. *See Sanders v. United States,* 594 F.2d 804, 808-11 n.11 (Ct.Cl. 1979), *cited with approval in Chappell v. Wallace,* 103 S.Ct. 2382 (1983). Van Drasek's claim for monetary relief is far from frivolous. Finally, no statute other than the Tucker Act waives sovereign immunity for the relief Van Drasek's seeks. The jurisdiction of the district court was therefore based albeit only in part, on the Tucker Act.[12]

III. CONCLUSION

By basing appellate jurisdiction on the original jurisdiction of the district court, the Federal Courts Improvement Act introduces yet another twist to the already unnecessarily complex law of federal court jurisdiction. The burden of wading through this jurisdictional quagmire outweighs, we think, the limited utility of providing uniform adjudication of such relatively small money claims against the United States. Until Congress sees fit to revisit the issue, however, we cannot ignore the mandate of the Act. We therefore transfer this case to the Federal Circuit pursuant to 28 U.S.C. § 1631.

So ordered.

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[11]That Van Drasek's claim for back pay is framed within a request for a writ of mandamus in no way affects this finding. Jurisdiction under the Tucker Act cannot be avoided by so disguising a money claim. *See* Portsmouth Redevelopment & Housting Authority v. Pierce, 706 F.2d 471, 474 (4th Cir.) ("Claims Court jurisdiction cannot be avoided by framing an essentially monetary claim in injunctive or declaratory terms"), *cert. denied,* 104 S.Ct. 392 (1983).

[12]This decision is in accord with recent cases that this court has transferred, by unpublished order, to the Federal Circuit. In Heisig v. United States, 719 F.2d 1153 (Fed. Cir. 1983), the plaintiff challenged a decision of the Army Board for Correction of Military Records in the district court. Like Van Drasek, Heisig preserved jurisdiction in the district court by waiving any recovery in excess of $10,000. *Id.* at 1156 n.8. After the district court denied all relief, Heisig appealed to this court, and we transferred the appeal to the Federal Circuit. Similarly, in Corwin v. Lehman, 724 F.2d 1577 (Fed. Cir.), *cert. denied,* 104 S.Ct. 2680 (1984), Naval Reserve officers challenged in the district court their involuntary transfers, requesting declaratory and injunctive relief as well as damages. The appeal from the district court's dismissal was originally lodged in this court. Upon an unopposed motion by the government, however, this court transferred the appeal to the Federal Circuit. *Id.* at 1578. *See also* Maier v. Orr, 754 F.2d 973 (Fed. Cir. 1985) (military back pay claim for under $10,000 appealed from District Court for the District of Hawaii to Federal Circuit).